



REPUBLIC OF KENYA



KENYA LAW
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**Muhanda v Midland Emporium Ltd (Environment & Land Case
68 of 2019) [2024] KEELC 265 (KLR) (31 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 265 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 68 OF 2019
DO OHUNGO, J
JANUARY 31, 2024**

BETWEEN

DENIS MUHANDA APPLICANT

AND

MIDLAND EMPORIUM LTD RESPONDENT

JUDGMENT

1. Proceedings in this matter commenced on April 10, 2015 when the applicant filed Originating Summons (OS) dated 23rd March 2015. The OS was filed in this court as ELC No. 99 of 2015. The matter was later transferred to the Subordinate Court and became Kakamega CMELC No. 21 of 2018. Subsequently, it was transferred back to this court, hence its current case number.
2. The applicant averred in the OS that being the legal representative of the estate of Festus Muhanda Bitinyu, he was entitled to the parcel of land known as Isukha/Shirere/2668 (the suit property) by adverse possession. He further averred that the respondent acquired title to the suit property fraudulently.
3. The OS was supported by an affidavit sworn by the applicant on March 23, 2015. He deposed that he was the legal representative of the estate of Festus Muhanda Bitinyu (deceased) who was his father and who was the proprietor of the suit property. That the deceased did not dispose of or alienate the suit property and that he (the applicant) still had in his possession the original of the title deed in respect of land parcel number Isukha/Shirere/236 which was subdivided to give rise to the suit property. He added that he and his brothers were in peaceful use of the suit property for over 40 years from their birth to the date of his said affidavit and that nothing stopped the respondent from taking possession of the suit property if its ownership “was clean.” That the deceased’s family sat sometime in the year 2004 and agreed to commence succession proceedings in respect of the deceased’s estate and that when they went to the land registry to conduct a search, they were shocked to find out that the suit property



- was registered in the name of the respondent after subdivision of Isukha/Shirere/236. He also stated that the respondent had never settled on, utilized, or set foot on the suit property.
4. The respondent opposed the OS through a replying affidavit sworn on May 2, 2015 by Mr Ramesh Kotecha. He deposed that on May 26, 1987, the respondent purchased from the deceased a portion of Isukha/Shirere/236 through a sale agreement a copy of which he annexed as RK - 1. That negotiations leading to the agreement started earlier in May 1987 and the deceased wrote a letter dated 15th May 1987 (annexure RK - 2) to the Clerk Kakamega Municipal Council seeking consent. He further deposed that the Land Control Board wrote a letter dated 7th July 1987 (annexure RK - 3) inviting the deceased and the respondent to a meeting and that their application was approved, and a communication made through letter dated 10th December 1987 (annexure RK - 4).
 5. The deponent went on to depose that the deceased then signed mutation forms which were registered thereby effecting subdivision of Isukha/Shirere/236 and creating the suit property which was transferred to the respondent. That the deceased paid for the survey and registration and receipts were issued (annexures RK – 5 and RK – 6). That land rates were paid and receipted (annexure RK – 7) and that the deceased signed the transfer form (annexure RK – 8) in the presence of his wife, son, and the deponent. He also deposed that the deceased was the area Chief, was well versed in land matters, and was well known by the Land Registrar and that by virtue of his position, the deceased was a member of the Land Control Committee of the Municipal Council and was well known by the members and public officers. He added that the respondent's initial intention in purchasing the suit property was for purposes of excavating rocks for quarry, but the relevant ministry declined to grant approval since the site was close to a river. The deponent denied that the respondent was involved in any fraud and further stated that neither the applicant nor his family had ever used the suit property as alleged. He also stated that the applicant was aware of the respondent's ownership of the suit property which is why they did not include it among the deceased's assets in the succession proceedings in respect of the deceased's estate.
 6. Hearing of the matter proceeded by way oral evidence. The applicant testified on 14th February 2022, as PW1 and adopted his above supporting affidavit as his evidence in chief. He produced a copy of a green card that was annexed to the affidavit (Plaintiff's Exhibit 1) and a copy of grant which was also annexed to the affidavit (Plaintiff's Exhibit 2). He further stated that he was six years old in 1987 and that as of the date of his testimony he was not aware whether his house was on the suit property or on Isukha/Shirere/2667. That the deceased was a chief employed by the government and was very knowledgeable on land matters. That prior to his death, the deceased did not file any case concerning the suit property and that when PW1's mother discovered that Isukha/Shirere/236 had been sub divided, she lodged a caution against the suit property.
 7. Next on the stand was Mr Tom M. Muhanda (PW2) who adopted an affidavit that he swore on 7th June 2021 and filed in this matter on 7th July 2021. He denied that he swore an affidavit on 1st April 2015 in which he stated that the respondent had purchased the suit property. He stated that the deceased was the Chief of the Municipality area of Kakamega, was well versed in land matters, and that if the deceased wanted to dispose of a portion of Isukha/Shirere/236 which fell within the jurisdiction of the Lurambi Land Control Board, the deceased would have presented the application for consent to Lurambi Land Control Board and not Municipality Land Control Board. That upon discovery of fraud perpetuated by the respondent, his mother immediately placed a caution against the suit property. He further stated that Isukha/Shirere/236 is ancestral land and that the deceased's family had exclusively used the said parcel for 40 years.
 8. The plaintiff's case was then closed.



9. Defence case proceeded on February 2, 2023, with Mr Ramesh Kotecha testifying as the sole defence witness. He stated that he was a director of the defendant and adopted his replying affidavit which was referred to earlier in this judgment. He also produced copies of annexures RK-1 to RK-8 as Defence Exhibits 1 to 8 respectively. Mr Kotecha further testified that the respondent took possession of the suit property in 1988 and fenced it.
10. Defence case was thereby closed. Both parties thereafter filed written submissions.
11. I have considered the pleadings, evidence, and submissions herein. Although the applicant made allegations of fraud, he did not in any way seek prayers connected to the said allegations. Instead, going by the OS and even the applicant's submissions, the relief sought by the applicant is exclusively that of adverse possession. I have in the circumstances not found it necessary to consider whether fraud was established. Thus, the issues that arise for determination are whether adverse possession was established and whether the reliefs sought should issue.
12. As the Court of Appeal stated in *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020] eKLR, the party claiming adverse possession must assert hostile title in denial of the title of the registered proprietor. The process must start with a wrongful dispossession of the rightful owner and the proper way of assessing proof of adverse possession is whether the title holder has been dispossessed or has discontinued his possession for the statutory period of 12 years, as opposed to whether the claimant has proved that he or she has been in possession for 12 years. The party who claims adverse possession must demonstrate the date he came into possession, the nature of his possession, whether the fact of his possession was known to the registered proprietor and that the possession was open and undisturbed for the requisite 12 years.
13. There is no dispute that the respondent is the registered proprietor of the suit property, having been so registered on October 28, 1988 and that the suit property is a subdivision of land parcel number Isukha/Shirere/236 whose registered owner was Festus Muhanda Bitinyu (deceased) who was the applicant's father. The applicant's case is that land parcel number Isukha/Shirere/236 and by extension the suit property is ancestral land on which he and his siblings were born and brought up.
14. To succeed in his claim for adverse possession, the applicant must among other requirements demonstrate the date he came into possession of the suit property and an intention to dispossess the registered proprietor. He must have dispossessed the registered proprietor or show that the proprietor discontinued his possession. It is not enough to just sit on the property and watch the clock tick for 12 years.
15. The Court of Appeal emphasised the aspect of intention to dispossess the registered proprietor when it stated in *Masambaga & 7 others v Malindi Holdings and Estate Limited* (Civil Appeal 165 of 2019) [2022] KECA 782 (KLR) (10 June 2022) (Judgment) as follows:

As explained in *Elements of Land Law*, 5th Edition by Kevin Gray and Susan Francis Gray at page 1179 "Possession is attributed to the squatter (and his possession is adverse) only if he has both factual possession (factum possessionis) and the requisite intention to possess (animus possidendi). These elements of factum and animus interact significantly and must coincide continuously throughout the entirety of the required period of possession.
16. To the extent that that land parcel number Isukha/Shirere/236 and the suit property are the applicant's ancestral land, I am not persuaded that the applicant has demonstrated any clear date of entry coupled with an intention to dispossess the proprietor. I say so because the copy of the register on record shows that the first registered proprietor of the suit property was the applicant's father who was so registered



on October 8, 1988. The respondent became the second registered proprietor on October 28, 1988. Prior to 28th October 1988, the applicant could not claim adverse possession against his own father in respect of ancestral land and after 28th October 1988, the applicant continued to occupy the suit property oblivious of the fact that land parcel number Isukha/Shirere/236 had been subdivided and that the respondent had become the registered proprietor of the suit property. In the applicant's own words, they only became aware after the deceased's family met sometime in the year 2004 to discuss how to commence succession proceedings in respect of the deceased's estate. It was also the applicant's testimony that upon making the discovery, his mother immediately lodged a caution against the suit property.

17. A perusal of the register shows that the caution was registered on September 30, 2011. Further, a perusal of the grant of letters of administration in respect of the deceased's estate shows that the said succession cause was filed in the year 2013. I am persuaded that the applicant became aware of the respondent's proprietorship in the year 2011. If there was any time that could run in favour of the applicant, it could only run from the year 2011. By April 10, 2015 when the applicant filed the OS herein, the requisite 12 years had not been attained.
18. In view of the foregoing discourse, I find that the applicant has failed to establish adverse possession. It follows therefore that the reliefs sought are not available.
19. In the result, I dismiss the applicant's case with costs to the respondent.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 31ST DAY OF JANUARY 2024.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Ms Ikhumba for the Applicant

Ms Masakhwe for the Respondent

Court Assistant: E. Juma

